

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

2. Mr. K. is an eighty-six-year-old man who suffers from congestive heart failure and suffers from pain due to a back injury. Mr. K. is prescribed Oxycodone for his back pain. Mr. K. receives personal care services from the Addison County Home Health and Hospice program through the Choices for Care program.

3. During late fall 2005; Mrs. K. and R.J. became acquainted.¹ R.J. offered the Ks help with removing debris and brush from their property and help with trash removal. R.J. testified that the Ks were not clients of Happy Hearts. Petitioner in his appeal noted that they were not paid for their services.

4. Petitioner was directed by his mother to remove debris and brush from the K's yard. Petitioner and his father removed the brush and debris from the yard. Mrs. K. invited both petitioner and his father into the house for a snack and a short chat. On three or four occasions, petitioner picked up the K's trash and transported it to the dump. R.J. testified that she and petitioner did the trash removal.

5. According to Mrs. K., petitioner dropped in to see the Ks several times when he did not have chores; petitioner did not come with anyone else during these visits.

6. The events leading to the abuse and exploitation investigation occurred during December 2005.

7. Mrs. K. testified that she kept Mr. K's bottle of Oxycodone on an end table in the living room by the sofa.

¹ Both Mrs. K. and R.J. agree that C., an employee of the local area on aging, brought them together.

Mrs. K. first noticed that the Oxycodone was gone after petitioner had paid a social visit and left her home. The pills were not on the end table. Mrs. K. looked for the pills with the help of Mr. K's personal care attendant. They were unable to find the pills. According to Mrs. K., she keeps a very clean and tidy home. Her home is not cluttered and she does not lose items in her home. Mrs. K. had the prescription refilled for her husband. After this incident, Mrs. K. placed the Oxycodone in the medicine cabinet in the bathroom.

8. Mrs. K. testified regarding the second time a bottle of Oxycodone was taken from the Ks' home. According to Mrs. K., petitioner returned to her home one to two weeks after the first incident with the pills. Petitioner was not there to do any chores. Petitioner came into the living room. Mrs. K. testified that petitioner then asked to wash his hands in the bathroom. Mrs. K. heard petitioner lock the door. Mrs. K. was suspicious about petitioner and attempted to open the door but it was locked. Mrs. K. heard the clicking sounds made when the medicine cabinet is opened and closed. According to Mrs. K., petitioner came out of the bathroom and left the Ks' home immediately. Mrs. K. checked the medicine cabinet after petitioner left the house and

found that the Oxycodone was missing. Mrs. K. had the prescription replaced. Mrs. K. testified that the events made the Ks fearful and they had a security system installed.

Mrs. K. described the medicine cabinet as being three feet high with three shelves. The medicine cabinet has two doors that are secured by a latch. When the medicine cabinet is opened or closed, the noise from the latch is audible. According to Mrs. K., the latch is audible in the hallway outside the bathroom with the bathroom door closed. The medicine cabinet is by the bathroom door.

9. Mrs. K. was unable to give exact dates for the above incidents noting the amount of time that had passed from the time of the incidents to the time of hearing. At hearing, she initially testified that the events occurred in March and April 2006. After her memory was refreshed, she testified that the events occurred in December 2005. Mrs. K. had recounted the events to M.S., Mr. K's case manager on December 27, 2005; to L.D. during the investigation, the Adult Protective Services investigator; and at hearing. Mrs. K. has consistently recounted what took place when the pills were taken; her testimony is credible as to what occurred regarding petitioner's visits and regarding when and how she found the pills missing.

10. M.S. is a case manager at Addison County Home Health and Hospice. M.S. has been Mr. K.'s case manager since October 2005. On December 27, 2005, M.S. telephoned the K residence. M.S. testified that Mrs. K. sounded upset and scared. According to M.S., Mrs. K. reported that petitioner took a bottle of oxycodone from the medicine cabinet. M.S. told Mrs. K not to let petitioner into her home. Based on this information, M.S. notified the police and Adult Protective Services.

11. M.S. visits and telephones the Ks two to three times a month. M.S. has been to the K residence many times and confirmed that the K residence is not cluttered or messy. M.S. confirmed that Mrs. K. is very organized. In addition, M.S. confirmed that there is a loud click when the medicine cabinet is opened and closed and that the click can be heard in the hallway.

12. The petitioner testified that he met the Ks during November 2005. The petitioner testified that he wants to do elder care as a career.

Petitioner was asked by his mother to remove brush and debris from the K property. Petitioner and his father removed the brush and debris. At that time, petitioner and his father were invited into the house by Mrs. K. for coffee

and a short visit. Petitioner's father confirmed removing brush and debris with his son and then visiting with the Ks. Petitioner's father came to the Ks' residence on only this one occasion. Petitioner stated he removed trash for the Ks on three or four occasions.

Petitioner testified that he was not aware there were narcotics in the house and that he never visited the Ks alone. The investigation report notes that petitioner stated he saw the oxycodone on the end table but did not take the pills. Petitioner's testimony that he did not know there were narcotics in the K residence is not credible in light of the information he gave the Adult Protective Service's investigator.

Petitioner offered his mother's testimony to support his testimony that he did not visit the Ks alone. R.J. testified that petitioner could not have gone to the Ks alone because petitioner did not have a driver's license and that petitioner was driven by others. R.J. was unaware that petitioner had three citations for driving with a suspended license. R.J. testified under cross-examination that she does not know whether petitioner went to the Ks alone.

13. J.L.W. has worked for Happy Hearts for seven years. J.L.W. is a LNA who also works for the Rutland County Mental

Health and has worked in the past for the local home health agency. J.L.W. has worked with petitioner through Happy Hearts and described petitioner as a good caregiver who is dedicated to elders.

J.L.W. testified that he knows the Ks because he worked as a LNA for Mr. K. through the home health agency.² He testified that he worked with Mr. K. over a three month period averaging six hours per week during three visits per week. His last day working with Mr. K. was October 19, 2005. J.L.W. described Mrs. K. as forgetful and paranoid. He testified that Mrs. K. repeated herself as an example of forgetfulness. He testified that she had a security system when he worked with them.

J.L.W.'s testimony regarding the security system is contradicted by Mrs. K.'s testimony that she installed the security system after the pills were taken. Mrs. K. supplied a copy of the billing and sales document from February 2006 for the security system corroborating that the installation occurred in 2006. DAIL proffered the testimony of M.S. to corroborate that the security system was installed after the

² DAIL objected to the above testimony based upon HIPAA. J.L.W.'s testimony was proffered regarding Mrs. K.'s credibility and petitioner's credibility, not Mr. K.'s medical condition. The objection is overruled because the evidence is relevant to the proceeding although, as noted above, little weight is given to the testimony.

December 2005 incidents. In addition, M.S. testified that Mrs. K. was not paranoid.

In light of the testimony from Mrs. K. and M.S., testimony from J.L.W. is not credible regarding Mrs. K. being paranoid and the dates when Mrs. K. had a security system.

14. L.D. is an investigator with Adult Protective Services. As part of her investigation, L.D. met with Mr. K., Mrs. K., Mr. K's personal care attendant, two police officers, and the petitioner. In her investigation, L.D. notes that both Mr. and Mrs. K. explained that they were frightened by petitioner and the taking of Mr. K.'s medications. L.D. interviewed petitioner last. According to L.D., petitioner stated that he saw the bottle of pills in the living room. Petitioner did not deny visiting the Ks alone or using the bathroom; he only denied taking the medications. Based on her investigation, L.D. substantiated abuse and exploitation. The substantiation was upheld in a Commissioner's Review.

RECOMMENDATION

DAIL's substantiation of abuse and exploitation by petitioner is affirmed.

REASONS

The Commissioner of DAIL is required by statute to investigate reports regarding the abuse and exploitation of vulnerable adults. 33 V.S.A. § 6906. DAIL is required to keep reports that are substantiated in a registry under the name of the person who committed the abuse and/or exploitation. 33 V.S.A. § 6911(b). Persons who are found to have committed abuse and/or exploitation may apply to the Human Services Board for relief on the grounds that the report in question is "unsubstantiated". 33 V.S.A. § 6906(d).

Mr. K. meets the definition of a vulnerable adult who is to be protected from exploitation. Vulnerable adult is defined at 33 V.S.A. § 6902(14)(C) and (D) to include an individual eighteen years or older who:

(C) has been receiving personal care services for more than one month from a home health agency certified by the Vermont department of health or from a person or organization that offers, provides, or arranges for personal care;

(D) regardless of residence or whether any type of service is received, is impaired due to brain damage, infirmities of aging, or a physical, mental, or developmental disability:

- (i) that results in some impairment of the individual's ability to provide for his or her own care without assistance, including the provision of food, shelter, clothing,

health care, supervision, or management of finances; or

- (ii) because of the disability or infirmity, the individual has an impaired ability to protect himself or herself from abuse, neglect, or exploitation.

At all times relevant to this proceeding, Mr. K. was a recipient of services through the Choices for Care program operated by DAIL. The Choices for Care program enables individuals who meet the level of care for nursing home care to remain in their homes through the provision of personal care services. Here, Mr. K. received and continues to receive services based on his physical disabilities and infirmities of aging through the Addison County Home Health and Hospice, a certified home health agency.

DAIL based their substantiation of abuse upon 33 V.S.A. § 6902(1)(E) which states:

Intentionally subjecting a vulnerable adult to behavior which should reasonably be expected to result in intimidation, fear, humiliation, degradation, agitation, disorientation, or other forms of serious emotional distress;

In addition, DAIL based their substantiation of exploitation upon 33 V.S.A. § 6902(6)(A) which states:

(A) Willfully using, withholding, transferring or disposing of funds or property of a vulnerable adult without or in excess of legal authority for the wrongful profit or advantage of another;

The issue is whether DAIL can show by a preponderance of evidence that petitioner took the medications from the K residence and whether petitioner's behavior meets the statutory criteria. DAIL meets its burden of proof if they can show it is more likely than not that petitioner abused and/or exploited Mr. K.

The evidence hinges on the credibility of the witnesses. Petitioner has attacked Mrs. K.'s credibility in order to undermine the allegations that petitioner took the medications from the K residence.

Petitioner has tried to characterize Mrs. K. as forgetful and paranoid.³ The evidence does not support this contention. Petitioner offered the testimony of J.L.W. J.L.W. is a long-term employee of petitioner's mother. As such, there is an element of bias in his testimony. J.L.W. had short-term interactions with the Ks for approximately three months (six hours per week caring for Mr. K.) prior to the petitioner meeting the Ks. J.L.W. characterized Mrs. K. as forgetful and paranoid; he testified that the Ks had a security system when he worked for them. The testimony demonstrated that the Ks did not install a security system

³ Petitioner's mother also testified regarding Mrs. K's forgetfulness. However, R.J. only met Mrs. K. a few times and has an interest in protecting her son and her business.

until 2006 or after the taking of Mr. K.'s medications. Further, M.S.'s testimony countered any suggestions of forgetfulness and paranoia; M.S. characterized Mrs. K. as organized and not paranoid.

Mrs. K. offered credible testimony regarding petitioner's propensity to stop at the Ks for a visit. Mrs. K. offered credible evidence regarding the events comprising the two incidents in which she discovered the medication missing after visits by petitioner. Mrs. K.'s testimony that she heard the click from the latch of the medicine cabinet when petitioner was in the bathroom is of particular importance as petitioner left quickly and Mrs. K. then found the medication missing. M.S. has confirmed that the noise from opening and closing the medicine cabinet can be heard in the hallway. In both cases, Mrs. K. had to secure new prescriptions for her husband. After the second time, the Ks installed a security system for protection.

Petitioner has argued that he did not visit the Ks and was never in their home by himself. The information L.D. gained through the investigation undercuts these assertions. Petitioner told L.D. that he saw the Oxycodone in the K's living room. Petitioner did not deny to L.D. that he visited on his own.

DAIL has shown by a preponderance of evidence that petitioner took medication (property) from a vulnerable adult. Petitioner did so without authority and for his own benefit. Thus, the substantiation by petitioner based upon exploitation is affirmed.

In addition, DAIL has shown by a preponderance of evidence that petitioner abused a vulnerable adult. Taking medication is an intentional act that should reasonably be expected to cause a vulnerable adult agitation, fear, and/or intimidation. In fact, the Ks put in a security system as a result. Thus, the substantiation of abuse by petitioner is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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